Filed 5/24/10 Kontoudakis v. Bei-Scott Co,. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOHN KONTOUDAKIS,

Plaintiff and Respondent,

v.

BEI-SCOTT COMPANY, et al.,

Defendants and Appellants.

H034544
(Santa Cruz County
Super.Ct.No. CV147359)

John Kontoudakis and Bei-Scott Company agreed to binding arbitration to resolve disputes involving easement rights for property located in Scotts Valley. Following an initial arbitration award that was confirmed by the court, the parties agreed to submit additional related disputes to the same arbitrator for resolution. After a further award was rendered, Kontoudakis petitioned to confirm it. Bei-Scott opposed the petition. It contended that the award should be vacated because the arbitrator failed to consider evidence; it argued in the alternative that there were mistakes in the award that should be corrected by the court. The court granted Kontoudakis's petition, and Bei-Scott appealed the judgment. We will affirm the judgment.

PROCEDURAL HISTORY

The controversy concerned Scotts Valley property owned by Kontoudakis. In August 2007, the parties filed with the court below a written stipulation to submit all of their disputes in the action to "final and binding arbitration pursuant to California [Code

of Civil Procedure section] 1280, et seq."[1] An order was entered on that stipulation and the court vacated a scheduled trial date.

On March 19, 2008, an award (Award) was issued by the arbitrator, Alan J. Smith. Kontoudakis filed a petition to confirm the Award, which was apparently unopposed. The court granted the petition on August 26, 2008. It is apparent that no appeal was taken from this order.

Thereafter, the parties agreed that the arbitrator could decide two additional issues, namely, (1) Bei-Scott's request to reopen the arbitration to consider additional evidence, and (2) Kontoudakis's request for a determination of whether he was entitled to damages for use of easements at issue in the case, and, if so, the amount of such damages. They agreed that the arbitrator would hear the issues through the submission of briefs. A briefing schedule was established, and the agreement concerning the submission of the additional issues to the arbitrator was memorialized in two letters circulated among counsel and the arbitrator. The agreement clearly provided that a further hearing would be held only if the arbitrator determined it to be necessary.

After briefing was concluded, and without a further hearing, on March 31, 2009,[2] the arbitrator rendered a supplemental decision (Supplemental Award). Kontoudakis filed a petition to confirm the Supplemental Award on April 24, 2009. Prior to the filing of the petition, counsel for Bei-Scott wrote to the arbitrator asking that he (1) schedule an evidentiary hearing on the matter of his claimed newly-discovered evidence, and (2) correct the Supplemental Award; the requests were opposed by Kontoudakis. The arbitrator denied both of Bei-Scott's requests by letter of May 26, 2009. On the date the

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[1] Further statutory references are to the Code of Civil Procedure unless otherwise stated.

[2] The Supplemental Award bears a date of "March 31, 2008," an obvious typographical error.

petition to confirm was originally noticed for hearing, the court noted that the matter was unopposed, and Bei-Scott's counsel requested a continuance to file opposition. The court granted the continuance request.

Bei-Scott thereafter filed a response to the petition, requesting that the Supplemental Award be corrected, or, in the alternative, vacated. Kontoudakis filed a reply urging that there were no legal grounds for correcting or vacating the Supplemental Award. After hearing argument, on June 26, 2009, the court granted the petition to confirm the Supplemental Award and entered as a judgment the Supplemental Award. Bei-Scott filed a timely notice of appeal from the order. A judgment confirming an arbitration award is appealable. (§ 1294, subd. (d); cf. *Mid-Wilshire Associates v. O'Leary* (1992) 7 Cal.App.4th 1450, 1454 [no appeal lies from order denying petition to vacate or correct arbitration award].)

DISCUSSION

I. *Contentions of the Parties*

Bei-Scott asserts in its opening brief that the trial court erred in confirming the Supplemental Award. It argues that the Supplemental Award should have been vacated because the arbitrator refused to hear additional evidence Bei-Scott proffered. Bei-Scott argues in the alternative that the court should have corrected the Supplemental Award because there was an evident mistake in a description of a thing, namely, the lease between the parties, because the arbitrator incorrectly stated that the lease provided for a five-year term and one option to renew for five years, rather than two options to renew, each for an additional term of five years. This mistake, Bei-Scott contends, resulted in a miscalculation of the amount of damages awarded to Kontoudakis.

Kontoudakis responds that the statutory grounds for vacating an arbitration award are limited and that Bei-Scott failed to present a ground for vacating the Supplemental Award in this instance. Additionally, he responds that there was no facial miscalculation

or mistake that justified correcting the Supplemental Award. Finally, Kontoudakis requests that he be awarded costs, including attorney fees.

Bei-Scott submitted no reply brief.

II. *Applicable Law*

California maintains a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. [Citations.]" (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322.) Because of this important public policy, arbitration awards are subject to extremely narrow judicial review. Courts will not review the merits of the controversy, the validity of the arbitrator's reasoning, or the sufficiency of the evidence supporting the arbitrator's award. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 (*Moncharsh*).) "The entire statutory arbitration scheme is designed to give the arbitrator the broadest possible powers." (*Marcus v. Superior Court* (1977) 75 Cal.App.3d 204, 210.)

As the California Supreme Court recently observed: "When parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision. [Citations.] Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for ' "[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement." ' [Citations.]" (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184; accord, *Moncharsh, supra*, 3 Cal.4th at p. 12 [" 'it is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible' "].)

The grounds for vacating an arbitration award specified in section 1286.2, subdivision (a),[3] are exclusive. (*Moncharsh, supra*, 3 Cal.4th at p. 10.) Further, an award may be vacated under this section under only "very limited circumstances" (*Delaney v. Dahl* (2002) 99 Cal.App.4th 647, 654.) Unless one of the statutory grounds is present, the award may not be vacated even if it facially contains a legal or factual error that results in an injustice. (*Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1313.) And an arbitrator does not exceed his or her power within the meaning of section 1286.2 by erroneously resolving a legal or factual issue "so long as the issue was within the scope of the controversy submitted." (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.)

The court shall correct an arbitration award, unless it is vacated under section 1286.2, under three circumstances. (§ 1286.6.)[4] The ground claimed by Bei-Scott here is

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[3] "Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following: [¶] (1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives." (1286.2, subd. (a).)

[4] "Subject to Section 1286.8, the court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that: [¶] (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; [¶] (b) The arbitrators exceeded their powers but the award may be corrected without affecting the

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that "[t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award." (§ 1286.6, subd. (a).) As is true with vacating an award, its correction "is likewise restricted to the narrow statutory grounds, 'and a dissatisfied litigant is limited thereto.' [Citation.]" (*Severtson v. Williams Construction Co.* (1985) 173 Cal.App.3d 86, 93 (*Severtson*).)

The same rules apply to limit appellate review of a judgment confirming an arbitration award. Under *Moncharsh, supra*, 3 Cal.4th 1, appellate courts cannot review the merits of the dispute, the sufficiency of the evidence, or the reasoning in support of the arbitrator's decision. (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 23.) As a general rule, "[t]he decision to confirm or vacate an arbitration award lies with the trial court." (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923; §§ 1285-1287.6.) "[W]e must accept the trial court's findings of fact if substantial evidence supports them, and we must draw every reasonable inference to support the award." (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1087.) "On issues concerning whether the arbitrator exceeded his powers, we review the trial court's decision de novo, but we must give substantial deference to the arbitrator's own assessment of his contractual authority." (*Ibid.; Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 373, 376 fn. 9; *California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 944-945.)

III. *Request to Vacate Supplemental Award*

Bei-Scott contends that the Supplemental Award should have been vacated pursuant to section 1286.2, subdivision (a)(5), which provides that the court shall vacate the arbitration award where "[t]he rights of the party were substantially prejudiced by . . .

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merits of the decision upon the controversy submitted; or [¶] (c) The award is imperfect in a matter of form, not affecting the merits of the controversy." (§ 1286.6.)

the refusal of the arbitrators to hear evidence material to the controversy . . . ."[5] The claim is without merit.

As noted, an arbitration award may be vacated pursuant to section 1286.2, subdivision (a) under only "very limited circumstances" (*Delaney v. Dahl*, *supra*, 99 Cal.App.4th at p. 654.) Under subdivision (a)(5) to section 1286.2, the party seeking to vacate the award must both demonstrate that its rights "were substantially prejudiced" by the arbitrator's refusal to hear evidence, *and* that the refused evidence was "material to the controversy." As one court has observed, an arbitration award challenge based on the arbitrator's refusal to hear material evidence does not "provide[] a back door to *Moncharsh*[, *supra*, 3 Cal.4th 1,] through which parties may routinely test the validity of legal theories of arbitrators. Instead, we interpret section 1286.2, subdivision [(a)(5)], as a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case." (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 438-439.)[6] Therefore, when "a party complains of excluded material

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[5] In the trial court, Bei-Scott in passing made the further claim that the **Supplemental Award should be vacated under section 1286.2, subdivision (a)(4), under** which the court shall vacate an arbitration award where the arbitrators exceeded their powers and "[t]he award cannot be corrected without affecting the merits of the decision on the controversy submitted." Paraphrasing only a portion of subdivision (a)(4), Bei-Scott asserted that the Supplemental Award should be vacated because "[t]he award cannot be corrected without affecting the merits of the decision on the controversy submitted . . . ." In its brief argument below, Bei-Scott omitted the additional requirement that the arbitrator must have exceeded his powers. In any event, it did not argue the position further below, and does not argue it on appeal. Any claim that the court should have vacated the Supplemental Award pursuant to section 1286.2, subdivision (a)(4)—although appearing to lack any merit in any event—is forfeited. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

[6] In *Hall v. Superior Court*, *supra*, 18 Cal.App.4th at page 437, the court was considering the propriety of the lower court's order vacating an arbitration award based upon, inter alia, the assertion that the arbitrator refused to reopen the arbitration and thereby refused to hear evidence material to the controversy, one of the grounds for

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evidence, the reviewing court should generally focus first on prejudice, not materiality." (*Id.* at p. 439.)

Bei-Scott did not show substantial prejudice here. After the original Award, Bei-Scott claimed that it discovered, in speaking with its tenant, that there had been improvements to the subject easement that had not been presented as evidence at the arbitration hearing. The arbitrator, after receiving briefing from both parties, concluded that Bei-Scott had failed to show why the evidence it urged him to consider "could not with reasonable diligence have been provided in the earlier arbitration. There is no indication it was lost, hidden or otherwise unavailable. . . . There is no offer of proof how this information was not readily available before [the arbitrator's prior] decision. The evidence was available but merely not requested. This is inadequate to justify setting aside the [prior] decision." Bei-Scott did not show in its response to the petition to confirm the Supplemental Award clear prejudice from the arbitrator's failure to consider the additional evidence. Indeed, it is noteworthy that, although the established arbitration briefing schedule permitted the filing of a reply to Kontoudakis's opposition to the request to consider new evidence, Bei-Scott filed no such reply prior to arbitrator's rendering of the Supplemental Award. Additionally, Bei-Scott filed no brief in opposition to Kontoudakis's brief submitted in support of his claim for damages.

Bei-Scott did not meet its burden of establishing that the Supplemental Award should have been vacated under section 1286.2, subdivision (a)(5). Further, in contrast to a case where an arbitrator refuses to consider evidence before rendering a decision, here, the arbitrator rendered the Award, it was confirmed without opposition, and it was only

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vacating an award under former subdivision (e) to section 1286.2. (See Stats. 1997, ch. 445, § 4, p. 2881.) In 2001, section 1286.2 was amended to redesignate former subdivisions (a) to (f) as subparagraphs under subdivision (a). (Stats. 2001, ch. 362, § 7, pp. 2872-2873.)

after the Award became final that Bei-Scott sought to present new evidence to the arbitrator. Under the circumstances, Bei-Scott "demonstrated no reason why the strong presumption in favor of the finality of the arbitral award should not apply here." (*Moncharsh, supra,* 3 Cal.4th at p. 33.)

IV. *Request to Correct Supplemental Award*

Bei-Scott argues, in the alternative to vacating the Supplemental Award, that it should have been corrected by the court. It contends that the arbitrator made an erroneous finding that the underlying lease was for a five-year term and had one option to renew for an additional five years, when, in reality, the lease contained a provision for two options to renew, each for an additional five-year term. Bei-Scott asserts further that, because of this erroneous finding, the arbitrator miscalculated the amount of damages owing to Kontoudakis. We reject Bei-Scott's claim of error.

Although Bei-Scott labels the relief it sought as a correction of the Supplemental Award with respect to "an evident mistake in the description of a[ny] thing . . . [i.e.,] the Lease Agreement," it is plain that its request was an improper attack on a factual finding of the arbitrator. As noted above, requests to correct an arbitration award are limited to the grounds stated in section 1286.6 (*Severtson, supra,* 173 Cal.App.3d at p. 93), and an arbitrator's errors of fact or law are generally not reviewable. (*Gueyffier v. Ann Summers, Ltd., supra*, 43 Cal.4th at p. 1184; cf. *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 877 [arbitrator's ability to correct award limited by statute, and arbitrator could not correct award to address subsequently discovered factual or legal error].)

In *DeMello v. Souza* (1973) 36 Cal.App.3d 79, 82 (*DeMello*), the appellate court addressed the propriety of the superior court's correction of an arbitration award to reduce by approximately $2,500 the amount of death benefits due under a pension plan. The appellate court reversed, holding, inter alia, that the lower court's correction of the arbitration award under the guise of there having been an evident miscalculation or

mistake in description of a person, thing or property under section 1286.6 was inappropriate. (*DeMello*, at pp. 86-87.) It found that although there was a conflict between the amount of death benefits stated in the arbitration award and the amount reflected in the parties' stipulation, this discrepancy did not constitute a miscalculation or a misdescription that could be corrected by the court: "[I]t is manifest that the award did not reveal on its face a miscalculation of figures and did not mistakenly describe a thing or property. The error claimed by Respondents and found by the trial court was not a mistake *in* the award, but rather a discrepancy between the award and the underlying stipulation. It is, of course, well settled that neither the merits of the controversy nor the sufficiency of the evidence to support the arbitrator's award are matters for judicial review [citations], and where, as here, the arbitrator decided a point pursuant to a valid contract, the parties are bound by the award even if the decision of the arbitrator is wrong [citation]." (*Id.* at pp. 86-87; see also *Severtson*, *supra*, 173 Cal.App.3d at pp. 91-95 [trial court did not err in refusing to confirm amended arbitration award, where amendment was a substantive revision to, rather than a correction of a miscalculation in, original award].)

The finding in the Supplemental Award that the subject lease contained one five-year option to renew was not a matter that could be corrected by the court. The claimed "mistake in the description" of this term of the lease is not one that is "evident" (§ 1286.6, subd. (a)) from the award. (See *Severtson*, *supra*, 173 Cal.App.3d at p. 94 [miscalculation, in order to be subject to correction under section 1286.6, must be evident in the sense that it "must appear *on the face* of the award].) Likewise, the claimed "miscalculation of figures" (§ 1286.6, subd. (a)), to the extent that Bei-Scott challenges the portion of the damage award that included $127,075 in rent, is not "evident" from the award. (See *Severtson*, at p. 94.) Rather, Bei-Scott's dispute concerning the rent

component of the award is an attack on a factual finding of the arbitrator, and is not subject to judicial review.[7]

V. *Respondent's Request for Appellate Attorney Fees*

Kontoudakis in his respondent's brief requests that he be awarded costs, including attorney fees. He argues that the parties' stipulation for arbitration contained an express provision for an award of attorney fees and that he is thus entitled to costs and fees pursuant to section 1293.2.[8]

Section 1293.2 provides that "[t]he court shall award costs upon any judicial proceeding under this title as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of the code." Section 1033.5, part of chapter 6 of the Code of Civil Procedure, provides that items recoverable as costs include attorney fees when authorized by contract. (§ 1033.5, subd. (a)(10)(A).) The judicial proceedings covered by this provision include petitions to confirm or vacate an arbitration award. (§ 1285.) An award of costs pursuant to section 1293.2, including attorney fees where appropriate, is mandatory. (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 707.)

Here, the parties' stipulation provided as follows: "Should either party be forced to seek enforcement of the arbitration award beyond simply filing it with this court, they [*sic.*] shall be entitled to an award of all costs, fees and expenses including attorneys[,] fees to be paid by the party against whom enforcement is ordered." It is thus plain that the recovery of attorney fees as an item of costs was expressly authorized by contract in

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[7] The Supplemental Award reflects that the rent portion of the award was based upon a calculation of $1,495 per month (as the appraised value for use of the subject parking lot) times 85 months. Had the arbitrator included this description of the rent award but erred in computing the total amount, there may have been an appropriate statutory basis to request that the court correct the award under section 1286.6.

[8] As noted, Bei-Scott did not file a reply brief. It thus submitted no opposition to Kontoudakis's request for costs and fees.

this instance. Therefore, Kontoudakis, being the prevailing party in this appeal, is entitled to recover his costs on appeal, including attorney fees. (See *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman* (2005) 129 Cal.App.4th 508, 514 [attorney fees authorized by contract awardable to parties prevailing in opposing petition to confirm arbitration award and in obtaining order vacating award]; *Corona v. Amherst Partners*, *supra*, 107 Cal.App.4th at p. 707 [attorney fees authorized by contract awarded to party successful in petition to confirm arbitration award]; *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 260-261 [party successful in confirming arbitration award where contract authorized attorney fee recovery entitled to postarbitration attorney fees].)[9] The determination of the amount of such costs and fees will be made by the trial court following the clerk's issuance of the remittitur. (Cal. Rules of Court, rule 8.278(c); see *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1267 [better practice where appellate court awards attorney fees is to have trial court determine fee amount].)

DISPOSITION

The judgment confirming the Supplemental Award is affirmed. Respondent Kontoudakis is awarded costs and attorney fees on appeal.

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[9] Kontoudakis generally makes a request for an award of costs and attorney fees. It is thus unclear whether he is seeking a blanket order awarding costs and attorney fees incurred in connection with all postarbitration proceedings (including those in the trial court), or is simply requesting costs and fees on appeal. Although Kontoudakis, in his reply below to Bei-Scott's request to vacate or correct the Supplemental Award, requested an award of attorney fees, the record is silent as to whether the trial court awarded him costs and/or attorney fees in connection with the postarbitration proceedings. The issue of the award of costs and fees incurred in the trial court is not properly before us (see *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 288 [request for fees incurred in trial court for successful opposition to anti-SLAPP motion denied by appellate court, where section 425.16, subdivision (c) expressly provided that such fee application be made to trial court]), and we treat Kontoudakis's claim here as a request for costs and fees on appeal.

Duffy, J.

WE CONCUR:

Rushing, P.J.

Premo, J.